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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 VERONICA L. WHITTY,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN, Commissioner of
10 Social Security,

11 Defendant.

Case No. 3:12-cv-05314-RJB-KLS

REPORT AND RECOMMENDATION

Noted for February 14, 2014

12 This case has been referred to Magistrate Judge Karen L. Strombom pursuant to 28
13 U.S.C. § 636(b)(1) and Local Rule MJR 3 and 4. This matter comes before the Court on
14 plaintiff's filing of a motion for attorney fees and expenses pursuant to the Equal Access to
15 Justice Act ("EAJA"), 28 U.S.C. § 2412. See ECF #13. After reviewing plaintiff's motion,
16 defendant's response thereto and the remaining record, the undersigned recommends that for the
17 reasons set forth below plaintiff's motion be denied.
18

19 DISCUSSION

20 On October 2, 2012, the undersigned issued a Report and Recommendation,
21 recommending that the Court adopt the parties' stipulated motion to remand this matter, which
22 the Court did on October 3, 2012 (see ECF #9-#11). On December 20, 2013, plaintiff filed her
23 motion for attorney's fees and expenses pursuant to the EAJA. See ECF #13. In her response to
24 plaintiff's motion, defendant argues plaintiff's motion should be denied as being untimely. The
25 undersigned agrees.
26

1 “A party seeking an award of fees and other expenses [pursuant to the EAJA] shall,
2 within thirty days of final judgment in the action, submit to the court an application for fees and
3 other expenses.” 28 U.S.C. § 2412(d)(1)(B). A “final judgment” is “a judgment that is final and
4 not appealable.” 28 U.S.C. § 2412(d)(2)(G). Because it “is a waiver of sovereign immunity,”
5 this “thirty day limitation period under the EAJA for submitting fee applications . . . should be
6 narrowly construed.” Arulampalam v. Gonzales, 399 F.3d 1087, 1089 (9th Cir. 2005). While
7 that deadline “is not, strictly speaking, jurisdictional,” furthermore, the Ninth Circuit has denied
8 EAJA fees motions on the basis of failure to comply therewith. Arulampalam, 399 F.3d at 1090;
9 see also Scarborough v. Principi, 541 U.S. 401, 413 (2004); Zheng v. Ashcroft, 383 F.3d 919,
10 922 (9th Cir. 2004) (finding petitioner’s motion for attorney’s fees to be untimely as EAJA’s
11 time limit was exceeded).

12
13 As pointed out by defendant, because the government has 60 days within which to appeal
14 a decision of this Court, the 30-day EAJA period for submitting an application for attorney’s fees
15 and other expenses does not begin running until “60 days after entry of the judgment.” Federal
16 Rule of Appellate Procedure (“Fed. R. App. P.”) 4(a)(1)(B). Here, although the Court issued an
17 order affirming the undersigned’s report and recommendation, no separate judgment was
18 entered. “A judgment is not ‘entered’ for notice of appeal purposes until a separate document is
19 filed, or 150 days have passed since the order was entered.” Tuando v. Prosser, 352 Fed. Appx.
20 213, 2009 WL 3748106 (9th Cir. Nov. 6, 2009) (citing Fed. R. Civ. P. 58(c)(2)(B); Fed. R. App.
21 P. 4(a)(7)(A)(ii)).

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24 In this case, therefore, entry of the judgment occurred on March 2, 2013, which is 150
25 days after filing of the Court’s order affirming the undersigned’s report and recommendation on
26 October 3, 2012. As noted by defendant, plaintiff then had 90 days (the 60-day appeal period

1 plus the 30-day EAJA deadline) in which to file her motion for attorney's fees and expenses, or
2 until May 31, 2013. But because, as defendant also notes, plaintiff did not file her motion until
3 December 20, 2013, that motion is untimely. Given that plaintiff has offered no argument as to
4 why the Court should not find it to be time barred, the undersigned recommends that it be denied
5 on that basis.

6
7 CONCLUSION

8 For all of the foregoing reasons, the undersigned recommends that plaintiff's motion for
9 attorney's fees and expenses pursuant to the EAJA (see ECF #13) be DENIED.

10 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
11 **fourteen (14) days** from service of this Report and Recommendation to file written objections
12 thereto. See also Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those
13 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the
14 time limit imposed by Fed. R. Civ. P. 72(b), the Clerk is directed set this matter for consideration
15 on **February 14, 2014**, as noted in the caption.

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17 DATED this 31st day of January, 2014.

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21 Karen L. Strombom
22 United States Magistrate Judge
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